SUPREME COURT, U. S.

75-989

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

DAVID LEON RUYLE and MEDILAB COMPANY,
a Michigan corporation,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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David Leon Ruyle and Medilab Company, a Michigan corporation, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered October 29, 1975.

OPINIONS BELOW

The pretrial opinion of the District Judge denying the Motion to Suppress Evidence is printed as Appendix "A", *infra*. The verdict of the Court is printed as Appendix "B", *infra*. The opinion of the Court of Appeals is not yet reported. It is printed as Appendix "C", *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on October 29, 1975 (Appendix "C", *infra*). A timely Petition for Rehearing was denied on December 4, 1975 (Appendix "D", *infra*). Jurisdiction is conferred upon this Court by 28 USC 1254. (An Application to extend the time for filing this Petition until January 6, 1976, is now pending.)

QUESTIONS PRESENTED FOR REVIEW

1.

May A Registered Distributor of Controlled Substances Be Convicted Of Violating 21 USC 841(a)(1) For Distributing A Controlled Substance Covered By His Registration To An Employee Of Another Registrant When The Distribution Is Made In Containers Containing The Registrant's Name And The Lot And Control Numbers As Required By Law And The Sale Price Is The Normal Wholesale Price And Not Black Market Prices?

II.

Where A Registered Distributor Of Controlled Substances Is Indicted By A Grand Jury For Unlawful Distribution Of Controlled Substances Covered By His Registration, Is He Denied Due Process Of Law And The Right To Be Proceeded Against Criminally Only Upon An Indictment, By The Failure Of The Government To Disclose To The Grand Jury That The Defendant Is A Registered Distributor?

III.

Is A Written Consent To Search A Man's Home Freely And Voluntarily Given When It Is Executed Immediately After The Man's Arrest In His Home And In The Face Of An Erroneous Claim By The Arresting Officer That He Has A Warrant Authorizing The Seizure Of The Man's Papers?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV, provides in part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

United States Constitution, Amendment V, provides in part:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a present

ment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law; . . .

Title 21 of the United States Code provides in pertinent part as follows:

§ 822. *Persons required to Register—Annual registration*

(a) Every person who manufactures, distributes, or dispenses any controlled substance or who proposes to engage in the manufacture, distribution, or dispensing of any controlled substance, shall obtain annually a registration issued by the Attorney General in accordance with the rules and regulations promulgated by him.

Authorized activities

(b) Persons registered by the Attorney General under this subchapter to manufacture, distribute, or dispense controlled substances are authorized to possess, manufacture, distribute, or dispense such substances (including any such activity in the conduct of research) to the extent authorized by their registration and in conformity with the other provision of this subchapter.

• • •

§ 841. *Prohibited acts A—Unlawful acts*

(a) Except as authorized by this subchapter, it shall be unlawful for any persons knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . .

§ 842. *Prohibited acts B—Unlawful acts*

(a) It shall be unlawful for any person—

* * *

(2) Who is a registrant to distribute or dispense a controlled substance not authorized by his registration to another registrant or other authorized person or to manufacture a controlled substance not authorized by his registration;

§ 885. *Burden of proof; liabilities*

(a) (1) It shall not be necessary for the United States to negative any exemption or exception set forth in this subchapter in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this subchapter, and the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit.

* * *

(b) In the absence of proof that a person is the duly authorized holder of an appropriate registration or order form issued under this subchapter, he shall be presumed not to be the holder of such registration or form, and the burden of going forward with the evidence with respect to such registration or form shall be upon him.

STATEMENT OF THE CASE

Petitioners David Ruyle and Medilab Company, a Michigan corporation, were indicted for violations of the Controlled Substances Act. The case was tried without a jury. At the conclusion of the trial, petitioner Ruyle was convicted of distributing secobarbital, a Schedule III controlled substance in violation of 21 USC, 841(a) (1), and petitioner Ruyle and Medilab were convicted of furnishing false reports concerning controlled substances in violation of 21 USC 843(a) (4). Petitioner Ruyle was sentenced to two years in prison plus a special parole term of two years and fined $5,000. Medilab was fined $5,000.

The Evidence Concerning the Sale Count.

Ruyle had been engaged in selling pharmaceuticals for eighteen years, first for major drug companies and the last four years preceding his arrest, self-employed. During the indictment period he and petitioner Medilab were registered with the Bureau of Narcotics and Dangerous Drugs as authorized distributors of Schedule III, IV and V controlled substances.

One of Ruyle's customers was the Arnold Drug Store chain in the Detroit metropolitan area, including the store in Farmington, Michigan. In June, 1971, the pharmacist at the Farmington store introduced Ruyle to one Al Katzen who was a salesman for Ciba Pharmaceutical Company. Katzen was not registered with the BNDD but was authorized to deal in controlled substances as a representative of his company.

Katzen testified that he told Ruyle that he had some doctors who would be interested in purchasing controlled substances and that they would not have to keep any records on them. In fact, he had no such arrangement.*

Shortly after meeting Katzen, Ruyle sold him ten 1000-capsule bottles of secobarbital at $15 per thousand. From then until April, 1972, there were probably four transactions involving secobarbital, duobarbital, and dextroamphetamine capsules.** Ruyle left his company name and the control numbers on the bottles as required by law, but Katzen scratched them off so that they could not be traced back.

On March 4, 1972, Katzen was arrested by State police officers for illegally selling eight bottles of 1000 capsules of secobarbital. Prosecution was tendered to the BNDD, and Katzen agreed to cooperate with them.

On April 14 he made a recorded phone call to Ruyle to arrange the purchase of ten bottles of secobarbital, increased to twenty bottles on a second phone call. He and Ruyle agreed to meet at 1:00 P.M. that day in the parking lot of a restaurant across the street from Ford Hospital, one of Ruyle's customers.

At the parking lot Katzen met Ruyle at the trunk of Ruyle's car. Ruyle's trunk was filled with pharmaceuticals, both controlled and uncontrolled substances. Katzen gave Ruyle $250 in marked money as Ruyle was removing from

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* Ruyle denied this. He testified that he understood that Katzen was moonlighting as a pharmacist for Arnold's and was supplying a nursing home next door to the Farmington store.

** Ruyle's records reflected four transactions. Katzen, testifying from memory, claimed that there were about ten transactions.

his trunk a carton containing thirty bottles of secobarbital. Each bottle was labeled "Pointe Distributors", Ruyle's registered assumed name, and each had the lot and control number required by law. Ruyle was then placed under arrest by BNDD agents.

Proceedings Before the Grand Jury.

Carl Hendrickson was a BNDD agent who arrested Ruyle. He presented the evidence to the grand jury concerning the alleged illegal sale. At trial, he acknowledged that he did not advise the grand jury that Ruyle was a registered distributor. When the government concluded its proofs, defendant moved to quash the indictment because of the nondisclosure by the government. The trial judge denied the motion as being untimely.

The Seizure of the records.

During the six weeks following Ruyle's arrest BNDD agents spent four full days auditing his records. Perceiving discrepancies in his records involving five sales invoices, the agents obtained another warrant for Ruyle's arrest, along with an administrative inspection warrant which authorized the agents to enter Medilab's premises during ordinary business hours and inspect the premises and all equipment, materials, containers and labels. It did not authorize any seizures.

Armed with the warrants, five agents in three cars arrived at Ruyle's home at about 8:00 A.M. on May 9, 1972. Ruyle appeared at the door partially dressed in pajamas and admitted the agents. He was advised that he was being placed under arrest pursuant to a warrant and

that the agents had an administrative inspection warrant which authorized them to seize his records. Ruyle then executed BNDD Form 488 entitled, "Consent to Search." After he got dressed, he and one of the agents went into the basement where the records were. The agent then seized the records and Ruyle's typewriter. Prior to trial Ruyle moved for suppression and return of the seized records. Following an evidentiary hearing, the trial judge denied the motion.

REASONS FOR GRANTING THE WRIT

I.

Petitioner Ruyle did not claim in either of the lower courts that he was exempt from prosecution under Section 841(a)(1). Such an argument would now be foreclosed in any event by this Court's decision in *United States v Moore*, — US — , 44 LW 4023 (#74-759, decided December 9, 1975), where this Court held that "only the lawful acts of registrants are exempted."

Instead, petitioner argued that in distributing the controlled substance he was acting within the scope of his registration; he was dealing with an agent of a registered manufacturer; he was selling at wholesale prices rather than black market prices;* the containers holding the controlled substances contained petitioner's name and the lot and control numbers of the drugs as required by

* The American Druggists' Blue Book, introduced at trial, lists all prescription drugs and the wholesale cost to the pharmacist. The wholesale prices for grain-and-a-half secobarbital sodium varied from manufacturer to manufacturer between $13.40 and $22.00 per 1000 capsules. Ruyle's price to Katzen on all transactions was $15.00 per 1000.

law; and the government could point to no statute or regulation under the Controlled Substances Act which petitioner violated.

In *Moore,* this Court ruled that a physician is limited by the definition of "practitioner" in Section 802(20) to the dispensing and use of drugs "in the course of professional practice or research." Petitioner, not being a physician, must look for guidance from what *Moore* called the "circular terms" of Section 822(b):

> Persons registered . . . are authorized to . . . distribute . . . to the extent authorized by their registration and in conformity with the other provisions of this subchapter.

Neither the indictment, the government's argument at trial, nor the judge's finding of guilt gave peitioner any hint of the regulation or statute which he was accused of violating. Section 841(a) (1) is a penalty statute, and alleging a violation of it does not give notice of the basis of the claimed illegality. See *Keck v United States,* 172 US 434, 437 (1899).

> The words "contrary to law", contained in the statute, clearly relate to legal provisions not found in Section 3082 itself, but we look in vain in the count for any indication of what was relied on as violative of the statutory regulations concerning the importation of merchandise.

See also *Babb v United States,* 218 F 2d 538 (CA 5, 1955), and *Steiner v United States,* 229 F 2d 745 (CA 9, 1956).

In the Court of Appeals the government argued that Section 885(a)(1) placed the burden upon petitioner to show that the distribution was lawful.*

The Court of Appeals in affirming the conviction said only:

> . . . There was sufficient evidence to support the district court's findings that the sales for which [petitioner] was convicted were made with knowledge that they were not authorized by his registration [Appendix A, *infra*].

There is a two-fold problem with this portion of the opinion. First, the trial judge made no such finding. He simply found without rationale that the transaction was an illegal one.** Secondly, the Court of Appeals language was taken from Section 842(a)(2) which provides a civil penalty for the following violation:

> It shall be unlawful for any person— . . . (2) who is a registrant to distribute or dispense a controlled

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* [Petitioner] has failed to show or offer proof to show that he has complied with the conditions of his authority in consummating the sale charged in the indictment . . . While [petitioner] showed the fact of registration by way of stipulation, this alone is insufficient to raise the defense of exception from the statute. It was incumbent upon [petitioner] to introduce some evidence, not only of his registration, but that the sale was within the ambit of his authority if he intended to rely upon exemption as a defense.

Government brief in the Court of Appeals, pp. 10-11.

** The Court's complete finding was as follows:

The Court believes from the testimony, and so finds, that this transaction was an illegal one and in violation of Title 21, Section 841(a)(1) of the United States Code. Mr. Ruyle did knowingly and unlawfully sell and distribute on or about April 14, 1972, 30,000 of the secobarbital capsules, a Schedule III controlled substance. [Appendix B, infra.]

> substance not authorized by his registration to another registrant or other authorized person . . .*

Petitioner was charged with a felony which included as an element that he acted "knowingly or intentionally". In such crimes, "to constitute guilt there must be not only a wrongful act, but a criminal intention." *Morissette v United States,* 342 US 246, 274 (1952). To this day, he still does not know what statute or regulation he violated or even what statute or regulation it is claimed that he violated.

II.

Suppression of relevant evidence at trial is a denial of due process. *Brady v Maryland,* 373 US 83 (1963); *Giles v Maryland,* 386 US 66 (1967). Grand jury proceedings are nonadversary in nature, as the Court below correctly noted, but this is a reason for full disclosure rather than an excuse for concealment. This precise point was considered in *Johnson v Superior Court,* 539 P 2d 792 (Cal 1975) which ordered an indictment dismissed because the district attorney kept the grand jury ignorant of relevant exculpatory evidence.

In *United States v Daneals,* 370 F Supp 1289 [WD NY, 1974], two district judges sitting together dismissed a large number of Selective Service indictments because the government witnesses informed the grand jury only that the registrants were classified 1-A and failed to advise the

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* We don't argue that because a person is in violation of Section 842 he cannot be prosecuted under Section 841. CF. §847. We simply point out that the Court of Appeals, not concerned with a charge under 842, nonetheless used that Section to sustain a conviction under Section 841. (Besides, how was this sale not authorized by his registration?)

grand jury of details concerning claims of hardship or conscientious objector status. See also *United States v Basurto*, 497 F 2d 781 (CA 9, 1974), where an indictment was dismissed because the government used perjured testimony before the grand jury, even though the government was not aware of the false testimony until after the indictment was handed down.

The trial judge rejected our claim because the motion came at trial which was the first time petitioner learned of the nondisclosure. In *Costello v United States*, 350 US 359 (1956), this Court reached the merits of a claim of incompetent evidence before the grand jury although the issue was not raised until trial when counsel first discovered the use of hearsay testimony.

The Court of Appeals rejected our claim, citing the *Costello* language that inadequate or incompetent evidence before the grand jury is not a ground to challenge an indictment. But our challenge was not to the quality of evidence presented but to the suppression of evidence. The exculpatory evidence suppressed was undisputed (stipulated to at trial) and crucial on an element of the crime. We aren't talking about suppression of exculpatory evidence, the truthfulness of which is challenged by the government. We don't claim that the Constitution requires a grand jury to resolve such factual issues. In this respect our case is much stronger than the California case cited above.

Unless we are prepared to acknowledge that the grand jury's only proper function is to rubber-stamp the prosecutor's discretion, we must condemn the action of the agent here. The question is important to the administration of justice, and the Court should resolve the conflict presented by the lower court decisions.

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III.

Bumper v *North Carolina*, 391 US 543, 548 (1968), held:

> The issue thus presented is whether a search can be justified as lawful on the basis of consent when that "consent" has been given only after the official conducting the search has asserted that he possesses a warrant. We hold that there can be no consent under such circumstances.

In this case, petitioner executed a consent to search after he had been placed under arrest and after he had been served with an administrative inspection warrant.

The seizure in this case comes squarely within the rule of *Bumper*. Even though the inspection warrant did not authorize the seizure of records and covered defendant's business premises two blocks away, the officers nonetheless asserted that the warrant gave them the right to seize the records.* It is this assertion, rather than the inspection warrant itself, which created the coercion destroying the validity of the consent.

If this Court wishes to retreat from *Bumper*, the case will give it a vehicle to do so. If *Bumper* has continuing vitality, the lower courts should not be allowed to ignore its teachings.

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* The testimony of the arresting officer was (p. 144 of the trial transcript):

> Q. Now, when was that consent executed in relation to the time you entered the house?
> A. Approximately 10 to 15 minutes after.
> Q. It was surely after you had announced to Mr. Ruyle that he was under arrest, is that right?
> A. Yes.
> Q. It was surely after you had announced to Mr. Ruyle that you had an inspection warrant which authorized you to seize his records?
> A. Yes.

RELIEF REQUESTED

For the foregoing reasons, petitioners pray that their Petition for Certiorari be granted.

Respectfully submitted,

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Dated: January 3, 1976.

OPINION ON MOTION TO SUPPRESS

(15) The Court: Well, the court is going to deny the defendant's motion to suppress evidence and return seized property. I feel, as I look at the totality of the situation, that Mr. Ruyle—and thinking even back to the Wayne Walker Steak House where he was arrested in the parking lot a gunpoint, he knew apparently that he was under surveillance or the officers were watching him and I think that this consent was done knowingly. Had he called you, of course, Mr. Gillis, prior to signing the consent, you would have advised him not to sign it, probably, but that is not in the equation at this point. He did sign it. Then, after signing it, I think he assisted the agents, knowing —they read to him the right to counsel, the right that he didn't have to make a statement and if he made one it could be used against him—I think all of those rights were given to him; and his wife was hysterical, as she had indicated from the witness stand when she said, why don't you go ahead and kill us and get this matter over with, which indicated further that she, too, had felt the pressure of these weeks of knowing that they were under surveillance and that this thing was hanging over their heads.

Therefore, the court will deny defendant's motion to suppress evidence and return seized property.

Will you bring in an order to that effect?

VERDICT OF THE COURT

(389) The Court: Well, gentlemen, we have had this case going on three days. It's unusual.

As to Mr. Gillis' motion to suppress the evidence because the search was illegal, the subsequent seizure was illegal, the court will deny that again.

The court will dismiss Counts IV, V, VI and VII, not being satisfied that Mr. Stebbins' testimony before the court as it relates to the records was just the best evidence. The court believes that this fellow Irv that has been referred to here should have been brought in here so that the court could have seen him and evaluated him. Since that its the initial place of the sale that took place, the court would have liked to have had an opportunity to evaluate Irv's testimony.

The two counts remaining out of the seven are Counts II and III and they give the court a great deal of concern here. There is no question that on April 14, 1972, Mr. Katzen and Mr. Ruyle met at the Gold Key Motel on the corner of the Boulevard and the Lodge Freeway. Mr. Katzen had indicated that he had purchased on ten occasions various controlled substances from the defendant. It is true that Mr. Ruyle was arrested at that time, that is, on Apil 14th, where the $250 had been (390) exchanged from Mr. Katzen to Mr. Ruyle, the $250 being marked, after which the police came with their guns drawn and arrested not only Mr. Ruyle but Mr. Katzen as well.

The court believes from the testimony, and so finds, that this transaction was an illegal one and in violation of Title 21, Sec. 841(a)(1) of the United States Code. Mr.

Ruyle did knowingly and unlawfully sell and distribute on or about April 14, 1972, 30,000 of the secobarbital capsules, a Schedule 3 controlled substance, in violation of Sec. 841(a)(1), Title 21.

Now, as to Count III, which reads: On or about December 10, 1971, in the Eastern District of Michigan, David Leon Ruyle and Medilab Company, a Michigan corporation, defendants herein, did knowingly, intentionally, and unlawfully furnish false and fraudulent material information in reports and records required to be kept concerning controlled substances, in that the defendants Ruyle and Medilab made entries and prepared invoices in Medilab records showing a sale of 100,000 secobarbital capsules, a Schedule 3 controlled substance, to Dr. Richard Tapert, when in fact no such sale of such controlled substance took place to Dr. Tapert; in violation of Title 21, Sec. 843(a)(4), United States Code.

(391) This Court was not impressed with the testimony of Dr. Tapert. I don't think that he was truthful when he said he just happened to run into Mr. Ruyle at this donut shop. I think this was probably pre-arranged and he knew that he was meeting the defendant there. Now, I didn't believe that part of the testimony.

The court, however, does find that the defendant herein did falsify and did furnish false and fraudulent material information in the reports and records required to be kept concerning the controlled substances, in that the defendants Ruyle and Medilab made entries and prepared invoices in Medilab records showing a sale of 100,000 secobarbital capsules, a Schedule 3 controlled substance, to Dr. Richard Tapert, when in fact no such sale of such controlled substance took place to Dr. Tapert; in violation of Title 21, Sec. 843(a)(4), United States Code.

So, out of the seven counts of the indictment, the court finds the defendant guilty of Count II and Count III and will dismiss Counts I, IV, V, VI and VII.

The Court will continue the defendant on bond and refer the matter to the Probation Department for a pre-sentence report.

Mr. Gillis: May I ask now, your Honor, for thirty days to file a brief and post-trial motion?

OPINION OF THE COURT OF APPEALS

No. 74-1822

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

United States of America, *Plaintiff-Appellee,* v. David Leon Ruyle and Medilab Company, *Defendants-Appellants.*	Appeal from the United States District Court for the Eastern District of Michigan.

Decided and Filed October 29, 1975.

Before Phillips, Chief Judge; Peck and Lively, Circuit Judges.

Lively, Circuit Judge. Defendant Ruyle waived trial by jury and was found guilty by the District Judge of knowing distribution of a controlled substance in violation of 21 U.S.C. § 841(a)(1), and intentionally furnishing false reports concerning controlled substances in violation of 21 U.S.C. § 843(a)(4). He was acquitted under five other counts. Though defendant was a registered distributor of controlled substances doing business as Medilab Company there was sufficient evidence to support the district court's findings that the sales for which he was convicted were made with knowledge that they were not authorized by his registration.

The conviction was based in part on records seized at defendant's home following his arrest by agents of the

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Bureau of Narcotics and Dangerous Drugs (BNDD). The agents did not have a search warrant for defendant's home, but did have an "administrative inspection warrant" for Medilab Company at an address which was about one block from his home. Pursuant to this warrant the agents were authorized "to enter the above described premises [the business establishment] at a reasonable time during ordinary business hours and to inspect in a reasonable manner and to a reasonable extent, including the collection of samples, if necessary, the establishment and all pertinent equipment, finished and unfinished materials, containers, and labeling thereon." Such warrants are authorized by the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 880.

It is clear that the inspection warrant gave the agents no authority to search defendant's home or seize any of his property there. However, one of the agents testified that immediately after arresting defendant pursuant to an arrest warrant and advising him of his *Miranda* rights the agent asked defendant where the records were located. Upon learning that the records were in the basement of defendant's home the agent advised defendant that the inspection warrant did not cover the situation and that defendant's consent would be required before the records could be removed from his home. The agents testified that he then read a "consent form" to defendant and that defendant signed the form. No search was conducted, but defendant and another agent went to the basement and picked up the records of defendant's drug business and the typewriter used by him in making the records. The substance of this testimony was confirmed by another BNDD agent who was present, but was disputed by the defendant and his wife.

At a hearing on defendant's motion to suppress the business records as evidence, and on appeal, defendant has maintained that his consent to the seizure of the records was not freely and voluntarily given. This contention is based on the fact that he was under arrest at the time he signed the consent and his testimony and that of his wife that the agents told him they had a warrant for the search of his home. In *Bumper* v. *North Carolina,* 391 U.S. 543 (1968), the Supreme Court held that a consent to search is not voluntary if it is based upon the statement by law enforcement officers that they have a warrant for search of the premises, stating:

> When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent. *Id* at 550.

The District Judge conducted a suppression hearing and determined that the consent in the present case was freely and voluntarily given. An examination of the transcript of those proceedings convinces us that there was no coercion, and that the defendant voluntarily surrendered the business records and typewriter with full knowledge that he had the right to require a warrant for the search of his home and seizure of his property.

The defendant moved during the trial to quash the indictment on the basis of testimony by one of the BNDD agents that he had not disclosed to the grand jury that defendant was a registered distributor of controlled substances. The government resisted the motion on grounds that it was not timely made and that defendant's status as a registrant was immaterial since he was charged with an unauthorized distribution.

The function of a grand jury is investigative. Its proceedings are not adversary in nature, but rather consist of inquiries conducted by laymen without resort to the technicalities of trial procedure. *Costello* v. *United States*, 350 U.S. 359, 363-64 (1956); *United States* v. *Levinson*, 405 F.2d 971, 980 (6th Cir. 1968); *cert. denied*, 395 U.S. 958 (1969); *United States* v. *Thomas*, 342 F.2d 132, 136 (6th Cir.), *cert. denied*, 382 U.S. 855 (1965). In *Costello, supra*, Mr. Justice Black wrote—

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more. 350 U.S. at 363.

The indictment in the present case was valid on its face and the defendant was not entitled to challenge it on the ground that information which he considered favorable to his defense was not presented to the grand jury.

Other issues raised by the defendant are without merit.

The judgment of the district court is affirmed.

ORDER

No. 74-1822

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

United States of America,
Plaintiff-Appellee,
v.
David Leon Ruyle and Medilab Company, a Michigan corporation,
Defendants-Appellants.

(Filed December 4, 1975)

Before: Phillips, Chief Judge; Peck and Lively, Circuit Judges.

No judge in active service having requested a rehearing en banc, the petition for rehearing filed herein has been referred to the panel which first considered the case.

Upon examination of the petition for rehearing the court concludes that the issues raised and argued therein were fully considered at the time of the original submission of this appeal.

The petition for rehearing is denied.

Entered by Order of the Court

John P. Hehman
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-989

DAVID LEON RUYLE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner Ruyle, a registered distributor of the controlled substance secobarbital, contends that there was insufficient evidence to support his conviction of distributing that substance in violation of 21 U.S.C. 841(a)(1); that the indictment was defective because the government failed to advise the grand jury that petitioner was a registered distributor of secobarbital; and that petitioner's consent to a search of his residence was involuntary.[1]

Following a non-jury trial in the United States District Court for the Eastern District of Michigan, petitioner

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[1]The instant petition asks this Court to review the convictions of both petitioners, but it does not state what relevance any of the issues raised has to petitioner Medilab's conviction for falsely reporting the sale of 100,000 secobarbital capsules, in violation of 21 U.S.C. 843(a)(4). Indeed, the petitioners' discussion of the questions presented is phrased solely in terms of petitioner Ruyle.

Ruyle was convicted on one count of distributing secobarbital, in violation of 21 U.S.C. 841(a)(1), and petitioners Ruyle and Medilab (a corporation owned and operated by Ruyle) were convicted on one count of furnishing false reports and records required to be kept concerning controlled substances, in violation of 21 U.S.C. 843(a)(4). Petitioner Ruyle was sentenced to two years' imprisonment, to be followed by a special parole term of two years, and a $5,000 fine. Petitioner Medilab was fined $5,000. The court of appeals affirmed (Pet. App. C).

1. Petitioner Ruyle was registered with the Bureau of Narcotics and Dangerous Drugs (BNDD)[2] to distribute secobarbital and other controlled substances in Schedules II through V of the Controlled Substances Act. In June 1971, he met Alvin Katzen, a salesman for Ciba Pharmaceutical Company, a registered manufacturer of controlled substances (Tr. 8-12).[3] Katzen advised Ruyle that he knew a number of doctors who would be interested in purchasing controlled substances and who would not "have to keep" any records of the transactions (Tr. 12).[4] Katzen in fact had no such arrangement (Tr. 13).

Shortly after this meeting until April of 1972, on approximately ten separate occasions Ruyle sold Katzen secobarb-

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[2]The BNDD was the predecessor of the Drug Enforcement Administration.

[3]"Tr." refers to the trial transcript. Katzen was not registered with the BNDD, but he was not required to register so long as the company for which he worked was registered, as it was, and so long as he possessed controlled substances only while "acting in the usual course of his business or employment." 21 U.S.C. 822(c)(1).

[4]21 U.S.C. 828 requires that distributions of controlled substances in Schedules I and II be pursuant to special order forms and that a duplicate of such a form be preserved by the person receiving the controlled substance. The distributor is required to preserve the original order.

ital, duobarbital, and dextroamphetamine (Schedule III substances), in quantities of tens of thousands of capsules (Tr. 14-18). Ruyle charged from $15 to $30 per thousand capsules (Tr. 14). Ruyle often delivered the capsules in containers which were either unlabeled or labeled as vitamins. On other occasions, the containers were properly labled with petitioner's trade name, Pointe Distributors, and with the appropriate lot and control numbers. After Katzen purchased the drugs from Ruyle, he removed the labels (Tr. 18-19).

On April 14, 1972, Katzen arranged to purchase 30,000 capsules of secobarbital from Ruyle. Katzen, who then was cooperating with the BNDD following his arrest on state drug charges, met Ruyle in a restaurant parking lot. Katzen gave Ruyle $250 in marked money in exchange for the secobarbital, which Ruyle obtained from the trunk of his car (Tr. 19-27).[5]

On May 9, 1972, BNDD agents arrived at Ruyle's residence. After Ruyle admitted the agents, they advised him that they had two warrants—one authorizing his arrest and the other authorizing the agents to enter and inspect petitioner Medilab's business premises, which were located about one block from Ruyle's residence (Hr. 4-7).[6] The agents then arrested Ruyle, advised him of his *Miranda* rights, and asked where he kept his business records and a certain typewriter used by petitioner in preparing records (Hr. 7-8).

Ruyle replied that the records and typewriter were in his residence. The agents informed him that the inspection warrant did not authorize a seizure of items from

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[5]This sale formed the basis of petitioner Ruyle's conviction under 21 U.S.C. 841(a)(1).

[6]"Hr." refers to the suppression hearing transcript.

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his residence and that they did not have another warrant authorizing such a seizure (Hr. 8-9). The agents advised Ruyle that the items could not be seized without his consent and that "he could sign a consent to search if he so desired" (Hr. 9). One agent then read a consent form to Ruyle; Ruyle signed the form and then led another agent to the basement of his residence, where the records and typewriter were located (Hr. 9-10).

2. Petitioner Ruyle contends (Pet. 9-12) that there was insufficient evidence to support his conviction for unlawfully distributing a controlled substance, in violation of 21 U.S.C. 841(a)(1). He does not claim that he was exempt from prosecution under that section by virtue of his registration as a distributor, and he acknowledges (Pet. 9) that "[s]uch an argument would now be foreclosed" by this Court's decision in *United States* v. *Moore*, No. 74-759, decided December 9, 1975.

The evidence was sufficient to show that Ruyle's distribution of secobarbital to Katzen on April 14, 1972, was unlawful. The district court was justified in concluding that Ruyle's registration did not authorize him to distribute secobarbital to Katzen, that Ruyle had an obligation to inquire into Katzen's authority to possess the secobarbital and that he failed to do so, and that Ruyle knew that the secobarbital he distributed to Katzen would be diverted from legitimate channels.[7]

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[7]As this Court noted in *United States* v. *Moore*, *supra*, slip op. 12-13:

> Congress was particularly concerned with the diversion of drugs from legitimate channels to illegitimate channels. *Id.*, at 6; S. Rep. No. 91-613, *supra*, at 4; 116 Cong. Rec. 996 (1970) (remarks of Senator Dodd). It was aware that registrants, who have the greatest access to controlled substances and therefore the greatest opportunity for diversion, were responsible for a large part of the illegal drug traffic. See 116 Cong. Rec. 1663 (1970) (remarks of Senator Hruska); 116 Cong. Rec. 998 (1970) (remarks of Senator Griffin).

The prohibitions of 21 U.S.C 841(a)(1) apply to "any person" who unlawfully distributes. Petitioner violated that section when he sold drugs, as he did here, "not for legitimate purposes, but 'primarily for the profits to be derived therefrom' [H.R. Rep. No. 91-1444, 91st Cong., 2d Sess. 3 (1970)]." *United States* v. *Moore, supra,* slip op. 12.[8] Indeed, Ruyle's sale of secobarbital to Katzen on April 14, 1972, was part of a series of approximately ten sales of controlled substances to Katzen, which Ruyle knew resulted in the diversion of these substances from legitimate channels of distribution, contrary to Ruyle's duty to guard against such diversions. See 21 C.F.R. 1301.71.[9]

Ruyle's knowledge of the illegality of the sales was demonstrated by his desire to keep his sales to Katzen secret, his belief that Katzen's customers would not keep records of the transactions, and his use of falsely labelled containers. Finally, the evidence demonstrated that Katzen was authorized to possess the secobarbital only in his capacity as a salesman for Ciba Pharmaceutical (see note 3, *supra*). Thus, Ruyle had a duty to make a good faith inquiry into Katzen's authority to possess secobarbital before distributing it to him. See 21 C.F.R. 1301.74. Ruyle failed to do this.

3. Petitioner Ruyle claims (Pet. 12-13) that an alleged failure by the prosecutor to apprise the grand jury of

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[8] As the Court noted in *Moore* (slip op. 8-9), the statutory scheme makes clear that 21 U.S.C. 841(a) must be read in light of 21 U.S.C. 843(b), which provides that registrants may distribute controlled substances only "to the extent authorized by their registration and in conformity with the other provisions of this subchapter." The Controlled Substances Act thus provides only "a qualified authorization of certain activities, not a blanket authorization of all acts by certain persons."

[9] See notes 3, 7 and 8, *supra*.

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his registration with the BNDD to distribute secobarbital invalidated the count of the indictment charging him with distributing that substance. The court of appeals rejected this contention, noting that Ruyle's registration was only a defense on the merits and that the grand jury was not required to hear evidence of such a defense (Pet. App. C-4). This conclusion was correct. See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338; *Costello* v. *United States*, 350 U.S. 359, 363-364; *United States* v. *Levinson*, 405 F. 2d 971 (C.A. 6).[10]

4. Petitioner Ruyle finally asserts (Pet. 14) that his consent to the seizure of his typewriter and business records from his residence was involuntary because the BNDD agents allegedly told him that the inspection warrant authorized them to seize the items. The record shows precisely the contrary; the agents expressly advised Ruyle that the warrant did not authorize them to seize the business records and typewriter from his residence and that such a seizure could only be made with his consent. The record also demonstrates that, having

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[10]Petitioner Ruyle is not aided by his reliance (Pet. 12) on *Johnson* v. *Superior Court of San Joaquin County*, 15 Cal. 3d 248, 124 Cal. Rptr. 32, 539 P.2d 792, where an indictment was dismissed because the grand jury was not given exculpatory evidence, in violation of a specific provision of the California Penal Code which requires a grand jury to hear such evidence. There is no comparable federal statute, nor is there a comparable requirement imposed by any federal court.

Petitioner Ruyle's reliance (Pet. 12) on *United States* v. *Daneals*, 370 F. Supp. 1289 (W.D. N.Y.) is similarly misplaced. There the dismissal of the indictment (comprising 153 selective service cases) was based on a totality of circumstances not present here. In *Daneals*, misleading information was given to the grand jurors, the hearsay nature of testimony was not made clear, an unauthorized person (the Selective Service Regional Counsel) was present before the grand jury, and the grand jurors were misled about the number of counts appearing in the final indictments.

been so apprised, petitioner voluntarily gave his consent.[11]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.

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[11]This Court has recently held that "the fact of custody alone has never been enough itself to demonstrate a coerced confession or consent to search." *United States* v. *Watson*, No. 74-538, decided January 26, 1976, slip op. 13. Here Ruyle's consent was given in his own residence, rather than in the police station. The agents advised him of his *Miranda* rights and that his consent was required before the items could be seized. Under these circumstances, the voluntariness of Ruyle's consent is evident. See *United States* v. *Watson, supra; Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-989

DAVID LEON RUYLE, et al,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY

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PETITIONERS' REPLY

I.

The government response asserts, at page 4:

> "The District Court was justified in concluding that . . . Ruyle knew that the secobarbital he distributed to Katzen would be diverted from legitimate channels.

First, the trial judge made no such finding.[1] Secondly, there was no evidence that Ruyle ever sold to anyone other than a registered distributor. Finally, giving full credit to Katzen's testimony, he told Ruyle that he was selling the drugs to doctors, albeit doctors who would not have to keep records. [transcript, page 12][2]

II.

At page 5, the government asserts:

> Ruyle's knowledge of the illegality of the sales was demonstrated by his desire to keep the sales to Katzen secret, his belief that Katzen's customers would not keep records of the transactions, and his use of falsely labeled containers.

There was simply no evidence that Ruyle desired to keep his sales secret. Ruyle's records, which were audited by the BNDD, reflected four sales to Katzen. The government evidence that there were any more sales is based solely on the uncertain testimony of Katzen:

> It is hard for me to estimate [the number of purchases from Mr. Ruyle between June, 1971, and April 14, 1972]. I would say somewhere between,

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[1] The trial judge simply concluded:

> The Court believes from the testimony, and so finds, that this transaction was an illegal one and in violation of Title 21, 841(a)(1) . . . [Appendix B-1].

[2] Ruyle was not prosecuted on the theory that he was aiding and abetting anyone else in the illegal distribution of drugs. Even if he had been, his alleged knowledge that the doctors weren't keeping records would be colorless on the question of guilt since the lack of records could equally be attributed to a desire by the doctors to evade income taxes. Cf. *Ingram* v *United States*, 360 US 672, 678-679.

probably around ten different occasions, approximately. [transcript, page 18].

The thirty bottles containing the secobarbital which were the subject of the indictment were properly labeled. As to the other sales, even Katzen acknowledged that "the majority of them had the original labels on them." He scratched off the company name and serial numbers after Ruyle sold to him. [transcript, pages 18-19].

III.

The government attempts to downgrade our first question into a naked sufficiency-of-the-evidence argument. The issue we tender is much more fundamental as our Petition clearly discloses—whether the statute gave Ruyle adequate notice that his conduct would be branded as criminal and whether the indictment notified him of the illegal conduct with which he was charged.

IV.

The record is clear that the BNDD agents had an *inspection* warrant which they served upon Ruyle when he was arrested. Before he executed the consent, the agents falsely represented that the warrant authorized seizure of his records, his controlled substances, and his typewriter. [trial transcript, pages 117, 144]. It was this misrepresentation as much as the arrest which destroyed the validity of the consent.

Respectfully submitted

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Dated: April 6, 1976